



TESTIMONY OF THE DEPARTMENT OF THE ATTORNEY GENERAL TWENTY-SIXTH LEGISLATURE, 2012

ON THE FOLLOWING MEASURE:

H.B. NO. 2440, RELATING TO CIVIL ACTIONS BY AND AGAINST THE STATE.

BEFORE THE:

HOUSE COMMITTEE ON JUDICIARY

DATE: Thursday, February 16, 2012

TIME: 2:40 p.m.

LOCATION: State Capitol, Room 325

TESTIFIER(S): David M. Louie, Attorney General, or
Kimberly T. Guidry, First Deputy Solicitor General

Chair Keith-Agaran and Members of the Committee:

The Department of the Attorney General strongly supports this bill.

The Department's ultimate goal is to protect and preserve the Legislature's sole authority to waive the State's immunity from suit. This bill clarifies the provision within section 661-1, Hawaii Revised Statutes (HRS), which allows private litigants to bring claims "founded upon any state statute" against the State. Specifically, this bill provides that section 661-1 does not on its own waive the State's immunity from any suit founded upon any State statute. The intent of the bill is to make clear that **the State's immunity is only waived when the Legislature unequivocally expresses its intent to waive the State's immunity in the statutory text of the separate statute upon which the claim is founded.** Pursuant to the plain language of the proposed amendment, "a claim founded upon a statute of the State is within the original jurisdiction of the courts only if, in the text of the separate statute upon which the claim is founded, the State has unequivocally waived its sovereign immunity for the claim."

The amendment is important because, as the Hawaii Supreme Court has recognized, "It is not a court's right to extend the waiver of sovereign immunity more broadly than has been directed by the [Legislature]." Chun v. Board of Trustees of the ERS, 106 Haw. 416, 432, 106 P.3d 339, 355 (2005). The proposed amendment seeks to permanently codify, in express terms, what Hawaii appellate courts have acknowledged in their case law. See ("A waiver of sovereign immunity must be unequivocally expressed in statutory text."); Garner v. State of Hawaii, 122 Hawai'i 150, 223 P.3d 215 (Haw. App. 2009) ("[Sec. 661-1] applies only when the **underlying** law clearly and unequivocally mandates a waiver."). The Department points out that it is the Legislature's – not the Judiciary's – prerogative to waive (or not waive)

the State's immunity. A law that defines the scope of the State's waiver of immunity with respect to claims founded upon State statutes should come from the Legislature not the Court.

The Department believes that the proposed amendment will accomplish the following important objectives:

- Preserve the Legislature's exclusive authority to determine whether and when the State has waived its immunity from suit by, in the context of section 661-1, HRS, requiring that the text of the underlying statute upon which a claim is founded "unequivocally" waives the State's immunity from suit;
- Provide guidance to potential litigants as to when the State has waived its immunity, and discourage them from wrongly interpreting section 661-1 as creating a blanket waiver of immunity for any damages suit against the State, predicated upon State statutes that do not themselves waive immunity;
- Prevent circuit courts from interpreting section 661-1 in a way that was never intended – i.e., as being in itself an "immunity-waiving" statute;
- Save the State the burden and expense of defending against improper, unnecessary and wasteful lawsuits;
- Protect the State from the possibility that the Hawaii appellate courts could, in the future, incorrectly interpret section 661-1 as itself providing a blanket waiver of immunity from any suit founded upon any State statute, regardless of whether the statutory text of the separate statute upon which the claim is founded provides a waiver.

The Department expects that this Committee may receive testimony from individuals who oppose the bill. The underlying reason for this opposition is obvious: the proposed legislation may make it more difficult for some plaintiffs to sue the State. To be clear, this bill does not itself prevent potential litigants from bringing suit. It preserves the Legislature's ability to determine whether and when these suits may be brought. It preserves the separation of powers by ensuring that only this Legislature may waive the State's inherent sovereign immunity from suits for retrospective money damages. It prevents the Judiciary from encroaching upon the limited waiver of immunity authorized by section 661-1, HRS, through its own unwarranted expansion of the present statutory language. This bill, if passed, would solidify the Legislature's control over whether and when a private litigant may bring a suit founded upon a State statute, by preserving, in plain terms, its right to waive (or not waive) the State's immunity in the text of that separate statute.

For all of the above reasons, the Department respectfully requests that this bill be passed.

**TESTIMONY OF ROBERT TOYOFUKU ON BEHALF OF THE HAWAII
ASSOCIATION FOR JUSTICE (HAJ) IN OPPOSITION TO H.B. NO. 2440**

Date: Thursday, February 16, 2012
Time: 2:40 pm

To: Chairman Gilbert Keith-Agaran and Members of the House Committee on Judiciary:

My name is Bob Toyofuku and I am presenting this testimony on behalf of the Hawaii Association for Justice (HAJ) in OPPOSITION to H.B. No. 2440, relating to Actions By And Against The State.

The State is generally immune from suit unless it has waived its sovereign immunity. HB 2440 modifies existing HRS § 661-1 to require an unequivocal waiver of sovereign immunity to be contained in the text of a state statute for any “claim” to be brought against the State.

This modification is not needed since the State must affirmatively waive its sovereign immunity under any statutory claim. It is also overly broad. The waiver of sovereign immunity does not currently require an explicit statement that “the state hereby waives its sovereign immunity for its violation of this statute.” The legislative intent to waive sovereign immunity may be obvious from the language, purpose or application of the statute. A statute, for example, which provides that the State may not take your private property without fair compensation need not further state, “but if the State does the State hereby unequivocally waives its sovereign immunity,” for an owner to file suit to require fair compensation. Our courts have ruled that there need not be an explicit waiver of sovereign immunity where the intent is otherwise obvious; as it would be absurd to conclude that the legislature gave citizens rights or placed obligations on government that could not be enforced.

If passed, HB 2440 may have drastic unintended consequences in other circumstances as well. The State does not have sovereign immunity for cases brought to enjoin or stop constitutional violations or statutory violations. “[S]overeign immunity may not be invoked as a defense by state officials who comprise an executive department of government when their action is attacked as being unconstitutional. Nor will sovereign immunity bar suits to enjoin state officials from violating state statutes.” *Pele Defense Fund v Paty*, 73 Haw. 578, 607, 837 P.2d 1247, 1265 (1992).

As drafted, HB 2440 would preclude a consumer or business from seeking to stop a statutory violation. For example, if the Department of Health is implementing inappropriate standards to prevent the sale of contaminated water as required under HRS Chapter 328D, HB 2440 would preclude a lawsuit to affirmatively enjoin state officials if Chapter 328D does not contain an “unequivocal waiver of sovereign immunity.”

The Attorney General’s justification for this bill refers to “back damages” so there must be a specific situation which this bill is intended to address. It is suggested that if there is a specific situation where there is a question of legislative intent to waive sovereign immunity, it is best to narrowly address that situation instead of painting with a broad brush that unintentionally and adversely affects all other situations.

Because HB 2440 is not needed and because it will have unintended consequences in precluding injunctions for statutory and constitutional violations, we urge the Committee to defer this measure.

Thank you very much for allowing me to testify in OPPOSITION to this measure. Please feel free to contact me should you have any questions or desire additional information.